IN THE

Supreme Court of the United States

OCTOBER TERM, 1975

NO. 75-1600

MICHAEL G. THEVIS, THE BOOK BIN, INC. and PENDULUM BOOKS, INC.,
Petitioners,

v.

UNITED STATES OF AMERICA,
Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

ROBERT EUGENE SMITH, Esquire
GILBERT H. DEITCH, Esquire
1409 Peachtree Street, N.E.
Atlanta, Georgia 30309
(404) 892-8890

Attorneys for Petitioners.

The Paul M. Harrod Company, Baltimore, Maryland 21234

INDEX

TABLE OF CONTENTS

Page

Opinion Below 2

Jurisdiction 2

Questions Presented 2

Constitutional and Statutory Provisions Involved 3

Statement 4

Reasons for Granting the Writ:–

I. The sentence imposed upon Petitioner Thevis, when considered in conjunction with a further sentence imposed upon said Petitioner in the Eastern District of Louisiana with which sentence the sentence herein is to run consecutively, constitutes cruel and unusual punishment in violation of the Eighth Amendment to the Constitution of the United States, and is further a reviewable abuse of discretion by the District Court 6

II. The evidence in the record is insufficient as a matter of law to establish the element of *scienter* as to Petitioner Thevis so as to meet the minimum constitutional standards for *scienter*, enunciated in *Hamling v. United States*, 418 U.S. 87 (1974). . 15

III. The publications charged against Petitioners are not obscene in the

Page

constitutional sense as a matter of law and are thus protected expression under the First Amendment to the Constitution of the United States 20

Conclusion 24

Appendix "A" 1

Appendix "B" 10

TABLE OF AUTHORITIES

Cases

Aday v. United States, 388 U.S. 447 (1967) 22
Boyce Motor Lines, Inc. v. United States, 342 U.S. 337, 340 16
Corinth Publications, Inc. v. Wesberry, 388 U.S. 488 (1967) 22
Dearman v. Woodson, 429 F.2d 1288 (1970) 9,14
Fox v. State of Washington, 236 U.S. 273 16
Furman v. Georgia, 408 U.S. 238 (1972) 7,10,11
Grove Press v. Gerstein, 378 U.S. 577 (1964) 22
Hamling v. United States, 418 U.S. 87 (1974) 3,17,19
Hancock v. Avery, 301 F. Supp. 786 (1969) 6
Hart v. Coiner, 483 F.2d 136 (1973) 8,12
Hoyt, et al., v. State of Minnesota, 399 U.S. 524 (1970). 22
Hygrade Provisions Co. v. Sherman, 266 U.S. 497 16
In Re Kemmler, 136 U.S. 436 (1890) 6
Jacobellis v. Ohio, 378 U.S. 184 (1964) 20
Jenkins v. Georgia, 418 U.S. 153 (1974) 20
Jordan v. Fitzharris, 257 F. Supp. 674 (1966) 7,8
Lee v. Tahash, 352 F.2d 970 (1965) 8
Louisiana ex rel. Francis v. Resweber, 329 U.S.459 (1947) .. 10
Manual Enterprises, Inc., v. Day, 370 U.S. 478 20
Mazes v. Ohio, 388 U.S. 453 (1967) 22
Memoirs v. Massachusetts, 383 U.S. 143 22
Miller v. California, 413 U.S. 15 (1973) 9,15
Mishkin v. New York, 383 U.S. 502 (1966) 17

Page

Nash v. United States, 299 U.S. 373 16
O'Neil v. Vermont, 144 U.S. 323 (1892) 11
Pinkus v. California, 400 U.S. 922 (1970) 22
Redding v. Pate, 220 F.Supp. 124 (1963) 6
Redrup v. New York, 386 U.S. 767 (1967) 9,15,21
Robinson v. California, 270 U.S. 660 (1962) 8,13
Roth v. United States, 354 U.S. 476 (1957) 16
Rudolph v. Alabama, 375 U.S. 889 (1963) 8
Smith v. Califnornia, 361 U.S. 147 (1959) 16
Trop v. Dulles, 356 U.S. 86 (1958) 7,10
United States v. Harris, 347 U.S. 612, 624 n. 15 16
United States v. Petrillo, 332 U.S. 1, 7-8 16
United States v. Ragen, 314 U.S. 513, 523-524 16
United States v. Wurzbach, 280 U.S. 396 16
Weems v. United States, 217 U.S.349 (1910) .. 7,8,10,11,13
Wright v. McMann, 397 F. 2d 519 (1967) 6

Constitution and Statutes

Unites States Constitution
First Amendment 3,15,16,17
Fifth Amendment 3
Eighth Amendment 2,3,6,7,10,11
Title 18, United States Code, Section 1461 4

IN THE

Supreme Court of the United States

OCTOBER TERM, 1975

NO. _____

MICHAEL G. THEVIS, THE BOOK BIN, INC. and PENDULUM BOOKS, INC.,
Petitioners,

v.

UNITED STATES OF AMERICA,
Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

Petitioners respectfully pray that a Writ of Certiorari issue to review the judgment and opinion of the United States Court of Appeals for the Fifth Circuit entered in the above case on February 6, 1976.

OPINION BELOW

The opinion of the United States Court of Appeals for the Fifth Circuit is as yet unreported; a copy of said opinion is set forth in Appendix "A" hereto.

JURISDICTION

The judgment of the United States Court of Appeals for the Fifth Circuit was entered on February 6, 1976. A Petition for Rehearing was timely filed and was denied on March 3, 1976. A copy of the Order denying the Petition for Rehearing is set forth in Appendix "B" hereto. On March 22, 1976, Mr. Justice Powell granted an extension of time to and including May 2, 1976 within which to file this Petition.

This Court's jurisdiction is invoked under Title 28, United States Code §1254(1).

QUESTIONS PRESENTED

1. Does the sentence imposed upon Petitioner Thevis, when considered in conjunction with a further sentence imposed upon said Petitioner in the Eastern District of Louisiana with which sentence the sentence herein is to run consecutively, constitute cruel and unusual punishment in violation of the Eighth Amendment to the Constitution of the United States, and is it further a reviewable abuse of discretion by the District Court?

2. Is the evidence in the record insufficient as a matter of law to establish the element of *scienter* as to Petitioner

Thevis so as to meet the minimum constitutional standards for *scienter* enunciated in *Hamling v. United States*, 418 U.S. 87 (1974)?

3. Are the publications charged against Petitioners not obscene in the constitutional sense as a matter of law and thus protected expression under the First Amendment to the Constitution of the United States?

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The First Amendment to the United States Constitution provides:

> "Congress shall make no law... abridging freedom of speech or of the press."

The Fifth Amendment to the United States Constitution provides:

> "No person shall... be deprived of life, liberty, or property without due process of law."

The Eighth Amendment to the United States Constitution provides:

> "Excessive bail shall not be required, nor excessive fines imposed, nor cruel or unusual punishment inflicted."

STATEMENT

The Petitioner herein, along with another Defendant who was acquitted, were tried in the United States District Court for the Northern District of Georgia on several charges of using the mails for the transportation of obscene materials in violation of Title 18, United States Code §1461. After a jury trial, the Petitioners were convicted as to all acounts on November 11, 1971.

The convictions were predicated upon use of the mails for the transportation of the following publications: (1) an advertising circular entitled "More Outstanding Book Bargains from Pendulum;" (2) a book entitled "Marital Confidences;" (3) a book entitled "Cruel Lips;" (4) three advertising circulars entitled "Fine Pendulum Magazines for the Connoisseur;" (5) an advertising circular entitled "Spring Book Bonanza from the Book Bin;" (6) a magazine entitled "The Wild Cats;" (7) a magazine entitled "Lezo;" (8) a magazine entitled "Body and Soul;" (9) a magazine entitled "Swap;" and (10) a book entitled "Indictments."

After the conviction, all Petitioners filed motions for acquittal, arrest of judgment, and new trial. All of said motions were denied by the District Court. The corporate petitioners were sentenced to fines totalling $30,000. Petitioner Thevis was sentenced to a fine of $45,000 and to a three-year term of imprisonment. Said term was specified to run consecutively with a five-year term of imprisonment previously imposed in a Federal obscenity prosecution in the Eastern District of Louisiana.

The distributions of allegedly obscene material which from the basis for the convictions below occurred between December of 1967 and August of 1969. Petitioner Thevis, prior to the conviction below, was convicted in the United States District Court for the Eastern District of Louisiana on a charge arising from the interstate shipment of allegedly obscene publications during virtually the same time period. That conviction was predicated upon distributions which occurred during the months of February, March and April of 1970. Thus, when read on conjunction, the two convictions deal with activity from late 1967 through early 1970, a period during which the constitutional validity of obscenity regulations was in serious doubt. Despite this, the convictions have precipitated sentences totalling eight years of imprisonment for Petitioner Thevis.

The conviction below was appealed to the United States Court of Appeals for the Fifth Circuit which affirmed in part and reversed in part. Since the conduct upon which the conviction was predicated occurred from 1967 through 1969, the Court of Appeals reviewed the materials under both the *Roth-Memoirs* standards and the *Miller* standards for judging obscenity. The magazine entitled "The Wild Cats" and the magazine entitled "Lezo" were found to constitute protected speech and the conviction predicated upon their distribution was reversed. The Court of Appeals affirmed the District Court judgment as to all other counts in a judgment and opinion for which review is sought here.

REASONS FOR GRANTING THE WRIT

I.

THE SENTENCE IMPOSED UPON PETITIONER THEVIS, WHEN CONSIDERED IN CONJUNCTION WITH A FURTHER SENTENCE IMPOSED UPON SAID PETITIONER IN THE EASTERN DISTRICT OF LOUISIANA WITH WHICH SENTENCE THE SENTENCE HEREIN IS TO RUN CONSECUTIVELY, CONSTITUTES CRUEL AND UNUSUAL PUNISHMENT IN VIOLATION OF THE EIGHTH AMENDMENT TO THE CONSTITUTION OF THE UNITED STATES, AND IS FURTHER A REVIEWABLE ABUSE OF DISCRETION BY THE DISTRICT COURT.

The *Eighth Amendment* to the *Constitution of the United States* provides, *inter alia*, that "cruel and unusual punishments [shall not be] inflicted." It must first be noted that cruel and unusual punishment, as a constitutional concept, is a principle which has not been found susceptible to precise definition. *In Re Kemmler*, 136 U.S. 436 (1890); *Wright v. McMann*, 397 F.2d 519 (2nd Cir. 1967); *Hancock v. Avery*, 301 F.Supp. 786 (M.D. Tenn. 1969); *Redding v. Pate*, 220 F.Supp. 124 (N.D. Ill. 1963).

As early as the nineteenth century, this Court acknowledged that:

> "Difficulty would attend the effort to define with exactness the extent of the constitutional provision

> which provides that cruel and unusual punishment shall not be inflicted . . . ." *Wilkerson v. Utah*, 99 U.S. 130, 135-36 (1878).

This continuing uncertainty was again underscored by the Court in *Weems v. United States*, 217 U.S. 349 (1910). There it was stated: "What constitutes a cruel and unusual punishment has not been exactly decided." *id.*, at 368. The uncertainty continues to this present day; it has been said that the statement in *Weems* "is as true today as it was in 1910." *Jordan v. Fitzharris*, 257 F.Supp. 674 (N.D. Cal. 1966). See also *Trop v. Dulles*, 356 U.S. 86 (1958).

It is further true that the *Eighth Amendment's* proscription of the infliction of punishments which can be designated as cruel and unusual is one of ancient derivation. The phrase appeared in the English Bill of Rights of December 16, 1689, and even earlier antecedents can be found in the Magna Carta. IV Blackstone, Commentaries at 379. The *Amendment's* proscription, however, is not grounded solely in ancient concepts of what is cruel and unusual. The test is always a modern one, since the judgment as to what is cruel and unusual must be made in light of "developing concepts of elemental decency." *Weems v. United States, supra.* at 378; *Jordan v. Fitzharris, supra,* at 679. In this connection the Supreme Court noted in *Weems* that:

> "A principle, to be vital, must be capable of wider application than the mischief which gave it birth. This is peculiarly true of constitutions." 217 U.S. at 373.

See also *Furman v. Georgia*, 408 U.S. 238 (1972).

Despite the necessary imprecision in definition and the constantly changing nature attending the evolution of the *Amendment's* meaning, certain broad principles underlying the proscription of cruel and unusual punishments can be articulated. In general, it is possible to identify three broad approaches to the question. *Jordan v. Fitzharris, supra,* at 679, quoting *Rudolph v. Alabama,* 375 U.S. 889, 890-91 (1963) (Goldburg, J., dissenting).

The initial approach involves a decision as to whether, under all the circumstances, the punishment in question is of such character "as to shock the general conscience or to be intolerable to fundamental fairness." *Lee v. Tahash,* 352 F.2d 970, 972 (8th Cir. 1965). This judgment must, of course, be made in light of current concepts of elemental decency. *Weems v. United States, supra; Trop v. Dulles, supra; Rudolph v. Alabama, supra.*

Secondly, it must be asked whether the punishment, under all the circumstances, is greatly disproportionate to the offense for which it is imposed. *Weems v. United States, supra; Robinson v. California,* 370 U.S. 660, 676 (1962) (Douglas, J., concurring); *Hart v. Coiner,* 483 F.2d 136 (4th Cir. 1973), *cert. denied,* 415 U.S. 938 (1974).

Lastly, it must be asked whether the punishment, although applied in pursuit of a legitimate penal aim, exceeds what is necessary to achieve that aim. *Weems v. United States, supra; Robinson v. California, supra; Rudolph v. Alabama, supra.* As the Tenth Circuit Court of Appeals has stated:

> "We think it beyond dispute that a punishment may be cruel and unusual when, although applied in pursuit of legitimate penal aims, it goes beyond what is necessary to achieve those aims." *Dearman v. Woodson,* 429 F.2d 1288, 1290 (10th Cir. 1970).

The punishment inflicted upon Petitioner Thevis in this case fails to pass constitutional muster under any of the tests enunciated above.

As to the first test, it can be seen that eight years of imprisonment, in light of the offense, surely:

> "offends concepts of decency and human dignity and precepts of civilization which Americans profess to possess . . . [and] it violates fundamental standards of good conscience and fairness." *Holt v. Sarver,* 300 F. Supp. 825, 827 (E.D. Ark. 1969).

The punishment here, it must be remembered, is inflicted upon a man who merely engaged in the dissemination of printed matter. The dissemination, moreover, occurred during what was then known as the "*Redrup* era." See *Redrup v. New York,* 387 U.S. 767 (1967). During that era disseminators of sexual materials placed reasonable reliance upon the principle that their activities were constitutionally protected in the absence of sales to minors, intrusions upon those who did not wish to be exposed, or pandering. *Redrup v. New York, supra.*

It is true that subsequent decisions of the Supreme Court have retreated from the *Redrup* position. See *Miller v. California,* 413 U.S. 15 (1973). But this definite shift in legal position did not occur until *after* the conduct which formed the basis for the instant prosecution. Further, it did not occur in an atmosphere of simplicity or legal obviousness.

The decision in *Miller* was as close as any decision of this Court can be, five votes to four. That decision was reached after extensive briefing by both sides and the further benefit of innumerable briefs *amicus curiae.* The decision was an agonizing one for this Court even after the benefit, through briefs, of such extensive legal scholarship. This briefing, and the benefit of the scholarship it contained, was unavailable to Petitioner Thevis. Further, the legal training of the nine Justices in the United States Supreme Court constitutes an exposure which Michael Thevis lacked.

In light of that difficulty of decision and in light of the reasonable reliance upon *Redrup* era law, the Court must decide the fundamental fairness of long years of imprisonment for Petitioner Thevis. The Court must decide whether common decency permits such extensive imprisonment for a man who, without the benefit of the legal counseling furnished to this Court, acted in accordance with the conclusions arrived at by four of its members.

It must, of course, be remembered that this test of what constitutes cruel and unusual punishment "is not fastened to the obsolete, but may acquire meaning as public opinion becomes enlightened by a humane justice." *Weems v. United States, supra,* at 378. In other words, the *Eighth Amendment* "must draw its meaning from the evolving standards of decency that mark the progress of a maturing society." *Trop v. Dulles, supra,* at 101. See also *Furman v. Georgia, supra.* When so judged, the punishment in this case must be found to be contrary to the "traditional humanity of modern anglo-american law." *Louisiana ex rel. Francis v. Resweber,* 329 U.S. 459, 463 (1947).

But by the same principles, the punishment in this case can be found to be greatly disproportionate to the offense charged. The principle that an excessive sentence may be invalid under this constitutional provision solely because of its disproportionality to the offense charged is an old one. As early as 1892, Mr. Justice Field suggested that the *Eighth Amendment's* prohibition is directed not only against torture or barbarism, but that it also prohibits "all punishment which by their excessive length or severity are greatly disproportioned to the offenses charged." *O'Neil v. Vermont,* 144 U.S. 323, 339 (1892) (Field, J., dissenting). Mr. Justice Field was joined in that view by Justices Harlan and Brewer.

While the view in *O'Neil* was a dissenting one, this Court in short order came to adopt it as the law. In 1910 the Supreme Court held it to be "a precept of justice that punishment for crime should be graduated and proportioned to the offense." *Weems v. United States, supra,* at 367. The Court in *Weems* noted, with apparent approval, the decision of the Supreme Judicial Court of Massachusetts to the effect that imprisonment for a long term of years "might be so disproportionate to the offense as to constitute a cruel and unusual punishment." *Id,* at 368. In *Furman v. Georgia, supra,* Mr. Justice Douglas found the idea of disproportionality to be rooted in documents as ancient as the Magna Carta, quoting from it to the effect that:

> "A free man shall not be amerced for a trivial offense, except in accordance with the degree of the offense; and for a serious offense he shall be amerced according to its gravity . . . . " *Furman v. Georgia, supra,* at 243.

Disproportionality between the offense and the punishment was the crucial element relied upon by the Fourth Circuit Court of Appeals in *Hart v. Coiner*, 483 F.2d 136 (4th Cir. 1973), *cert. denied*, 415 U.S. 938 (1974). The Court of Appeals in that case held application of the West Virginia habitual offender statute to be cruel and unusual punishment in light of the nature of the underlying offenses which the individual had there committed. Mr. Hart was sentenced, pursuant to a recidivist statute, to life imprisonment because of his conviction for three felonies. The first conviction was for writing a bad check, the second for transporting forged checks, and the third for perjury.

The Court of Appeals, in holding that Hart's sentence was constitutionally impermissible, noted:

> "After analyzing what we believe to be the relevant criteria under the eighth amendment, we conclude that the sentence imposed upon Hart is constitutionally excessive and wholly disproportionate to the nature of the offenses he committed, and not necessary to achieve any legitimate legislative purpose." *Id.* at 143.

The punishment imposed upon Petitioner Thevis must be found equally disproportionate to the offenses with which he is charged. It can be conceded that imprisonment for a term of eight years is not severe in the abstract. But that, of course, is not the test:

> "That the punishment is not severe, 'in the abstract,' is irrelevant; 'even one day in prison would be a cruel and unusual punishment for the crime of having a common cold.'" *Furman v. Georgia, supra,* at 273.

The Court of Appeals in *Hart* noted the very particularized nature of this constitutional attack. In reference to Hart's argument that Court noted:

> "[Hart] does not urge that life imprisonment *per se* is either cruel or unusual. Nor does he urge that the statutory scheme has been discriminatorily applied. The issue he does raise is whether the recidivist mandatory life sentence *in this case* is so excessive and disproportionate to the underlying offenses as to constitute cruel and unusual punishment." *Id.*, at 139.

Like the appellant in *Hart*, Michael Thevis does not urge that eight years of imprisonment *per se* is either cruel or unusual. Nor does he urge that the statutory scheme has been discriminatorily applied. The issue he does raise is whether eight years of imprisonment, *in this case*, is so excessive and disproportionate to the underlying offenses as to constitute cruel and unusual punishment. It is respectfully urged that such a sentence is such an excessive punishment for the distribution of printed materials in reasonable reliance upon then prevailing Supreme Court pronouncements that it must be held to constitute cruel and unusual punishment.

Lastly, though the punishment in this case may be found to be in pursuit of legitimate penal aim, it clearly goes beyond what is necessary to achieve that aim. That such an excess may make a punishment cruel or unusual was recognized by this Court in *Weems v. United States, supra,* at 370. See also *Robinson v. California, supra,* at 677

(Douglas, J., concurring). As the Court of Appeals said in *Dearman v. Woodson*, 429 F.2d 1288 (10th Cir. 1970):

> "Cruel and unusual punishment, as a constitutional concept, is a principle which has not traditionally lent itself to precise definition. However, we think it beyond dispute that a punishment may be cruel and unusual when, although applied in pursuit of legitimate penal aims, it goes beyond what is necessary to achieve those aims." *Id.*, at 1290.

Conceding the appropriateness of prohibiting and punishing the distribution of obscene materials, this court must consider what penal aim is served by massive punishment for conduct which occurred while the state of the law was uncertain.

Punishment may serve many ends. The possibility of punishment, may serve to deter or prevent crime. Punishment of imprisonment may serve to separate sociopathic individuals from a society which they may harm. Imprisonment may also facilitate rehabilitation of such individuals through strict control over their environment. Finally, punishment may serve the societal goal of retribution, a concept embodied in the common notion of making one "pay for one's sins." See ABA, Standards Relating To Sentencing Alternatives and Procedures (approved draft, 1968).

The goal of deterence can hardly be effectuated by the imposition of harsh punishment for acts not determined as criminal until after their occurrence. The conduct which formed the basis for the instant prosecution occurred while the state of the law in the area of obscenity prosecution

was guided by the principles enunciated in *Redrup v. New York, supra.* The only "crime" here committed was an incorrect prediction as to the course the Court would later follow in *Miller v. California, supra.* Once the state of the law was made clear in *Miller,* Petitioner Thevis removed himself from the adult book business. He has shown himself to be in no need of deterence from violating clear legal proscriptions, since the acts for which he is incarcerated were not clearly illegal when they were committed.

Nor has Michael Thevis been shown to be a sociopath who must be segregated from society and incarcerated for society's protection. Finally, whatever retribution is owed for the acts which formed the basis for this prosecution must be quantified in light of the uncertain status of the law at the time they were committed. By any such analysis, eight years of imprisonment for the distribution of printed materials at a time when such distribution was colorably protected by the *First Amendment* to the *United States Constitution* must be viewed as grossly excessive.

II.

> THE EVIDENCE IN THE RECORD IS INSUFFICIENT AS A MATTER OF LAW TO ESTABLISH THE ELEMENT OF *SCIENTER* AS TO PETITIONER THEVIS SO AS TO MEET THE MINIMUM CONSTITUTIONAL STANDARDS FOR *SCIENTER* ENUNCIATED IN *HAMLING V. UNITED STATES*, 418 U.S. 87 (1974).

Petitioner Thevis respectfully submits that the record is completely devoid of any evidence sufficient to predicate a

constitutionally acceptable finding of *scienter*. Any formulation of the principles governing the issue of *scienter* in the area of *First Amendment* litigation must originate with the decision of this Court in *Roth v. United States*, 354 U.S. 476 (1957).

In deciding *Roth v. United States*, the Court stated that the obscenity statutes there involved and as construed were not too ambiguous to define a criminal offense. Each of the cases cited to support this ruling, however, stressed the fact that the respective statute involved was directed only at those with guilty knowledge or intent. *See, United States v. Petrillo*, 332 U.S. 1, 7-8; *United States v. Harris*, 347 U.S. 612, 624 n. 15; *Boyce Motor Lines, Inc. v. United States*, 342 U.S. 337, 340; *United States v. Ragen*, 314 U.S. 513, 523-524; *United States v. Wurzbach*, 280 U.S. 396; *Hygrade Provisions Co. v. Sherman*, 266 U.S. 497; *Fox v. State of Washington*, 236 U.S. 273; and *Nash v. United States*, 229 U.S. 373.

The constitutional validity of the obscenity statutes involved in *Roth* rested, therefore, in significant measure upon the understanding that the statutes were not intended to apply to those who distribute material dealing with sex, but only to those who had knowledge that the particular material was of obscene character and content.

The issue finally was resolved by the decision in *Smith v. California*, 361 U.S. 147 (1959). It was there held that the strict liability feature of the California obscenity ordinance there involved was seriously restricting the circulation of books which are not obscene, "by penalizing booksellers, even though they had not the slightest notice of

the character of the books they sold". 361 U.S. at 152. The tendency of the California ordinance, the Supreme Court held, was to erode fundamental freedoms of speech and press by holding a bookseller criminally liable for possessing an obscene book, "wholly apart from any *scienter* on his part regarding the book's obscenity." 361 U.S. at 160.

In *Mishkin v. New York*, 383 U.S. 502 (1966), the Court stated:

> "The Constitution requires proof of *scienter* to avoid the hazard of self- censorship of constitutionally protected material and to compensate for the ambiguities inherent in the definition of obscenity."

In approving the authoritative interpretation placed upon the New York obscenity statute by the highest court of the State with respect to the "stringent *scienter* requirement" and "vital element of *scienter*", 383 U.S. at 507, 510 n.5, the Court specifically noted that a paranthetical reference in the Court of Appeals' opinion to "knowledge of the contents of the books" was not to be read as a "modification of this definition of *scienter.*" 383 U.S. at 510 n.9.

The most recent decision of this Court on the minimum *Scienter* necessary to satisfy the requirements of Due Process and the *First Amendment* in an obscenity prosecution is *Hamling v. United States*, 418 U.S. 87 (1974). There, the Court states:

> "[W]e think the 'knowingly' language of 18 U.S.C. §1462 and the instructions given by the

> district court in this case satisfy the constitutional requirements of scienter. It is constitutionally sufficient that *the prosecution show that a defendant had knowledge of the contents of the material he distributes, and he knew the character and nature of the materials.*" 418 U.S., at 123 (emphasis added).

Thus, the test, as enunciated in *Hamling*, was whether the prosecution shows that a defendant "had knowledge of the contents of the material he distributed, and he knew the character and nature of the materials." There can be no question but that the record below is completely devoid of any such evidence as to Petitioner Thevis.

The record contains the testimony of only three witnesses relating to the involvement of Michael Thevis, in the activities of the corporate Petitioners herein, The Book Bin, Inc. and Pendulum Books, Inc.

The first of those three witnesses is Mr. Grover C. Reynolds, Business License Inspector for the City of Atlanta, Georgia. Mr. Reynolds testified only as to a January 15, 1969 application for a business license for Pendulum Books, Inc. Said application listed M. G. Thevis as President of Pendulum Books. This testimony is thus devoid of any evidence on the issue of *scienter* as to Michael Thevis. It shows nothing as to his awareness of the nature, content, and character of the materials charged as obscene in the within proceedings.

The second witness testifying on the involvement of individuals with the corporate Petitioners herein was Mr. Adrian Arias, Vice President of the National Bank of

Georgia, Atlanta, Georgia. Mr. Arias' testimony was directly solely to Joan Thevis who was acquitted at trial. Mr. Arias testified that Joan Thevis, at all times material herein, signed all of the checks written on the account of Petitioner Book Bin, Inc. His testimony was in no way related to Petitioner Thevis.

Lastly, the record contains the testimony of Mrs. Wanza L. Spencer who was employed by Peachtree News Company for a short period of time in the summer of 1969. She testified that she was hired for that employed by Michael Thevis. Mrs. Spencer was never employed by either of the corporate Petitioners, and she testified only that said corporation had officers in the same building with Peachtree News, the company for which she worked. She testified that she saw the *covers* of some of the magazines distributed by The Book Bin. She testified that she did not see the contents of any of the magazines, that she had not seen any of the books distributed by The Book Bin. Mrs. Spencer offered no testimony as to the any of the kind of the materials distributed by Pendulum Books, Inc.

It can thus be seen that the record is completely devoid of any evidence whatsoever going to the issue of *scienter* as to the individual defendant Michael George Thevis. There is no evidence whatsoever, circumstantial or otherwise, that he had any knowledge whatsoever of the nature, character, or content of the materials which form the basis for the prosecution below. Such knowledge was delineated as the minimum acceptance constitutional standard of *scienter* in *Hamling v. United States, supra.* In the absence of any proof establishing such *scienter*, the conviction of the Petitioner Michael Thevis must therefore be reversed.

III.

THE PUBLICATIONS CHARGED AGAINST PETITIONERS ARE NOT OBSCENE IN THE CONSTITUTIONAL SENSE AS A MATTER OF LAW AND ARE THUS PROTECTED EXPRESSION UNDER THE FIRST AMENDMENT TO THE CONSTITUTION OF THE UNITED STATES.

The Appellants respectfully request the Court to perform its judicial duty, enunciated in *Jacobellis v. Ohio*, 378 U.S. 184 (1964), to determine the obscenity *vel non* of the publications charged as obscene in the instant proceedings. On the basis of such an independent review, the convictions in this case must be reversed.

The doctrine necessitating an independent appellate review of the alleged obscenity of materials found obscene at the trial level was enunciated by this Court in *Jacobellis v. Ohio*, 378 U.S. 184 (1964). The Court there held that its duty, as an appellate court, "admits of no 'substitute for facing up to the tough individual problems of constitutional judgment involved in every obscenity case'." *Id.* at 188, quoting *Manual Enterprises, Inc. v. Day*, 370 U.S. 478, 488.

The continuing validity of this doctrine and of the appellate duty it imposes was recently affirmed in *Jenkins v. Georgia*, 418 U.S. 153 (1974). In *Jenkins*, this Court reversed a state obscenity conviction predicated upon an exhibition of the film "Carnal Knowledge." The reversal was based upon the Court's own viewing of the film, and the finding that it was not, as a matter of constitutional law, obscene.

The Petitioners here should be judged as the Fifth Circuit ruled, by the status of the law on the standards being applied as of the time of the commission of the offense – December 1967 through August 1969. Briefly, the law which was being applied at that time permitted a certain type of judicial review which has been characterized as the *Redrup v. New York*, 386 U.S. 767 (1967), approach.

In *Redrup* the Court, in a *per curiam* opinion, held that the materials before it could not be said to be obscene in the constitutional sense. Thereafter, the Court laid down suggested criteria for balancing the determination of whether material could be said to be obscene with emphasis on the manner of dissemination, rather than on the materials disseminated.

The Court, in essence, suggested that where there was no evidence of sales to minors under state statutes reflecting a specific and limited concern for juveniles, nor where there was any dissemination or attempt at dissemination in a manner calculated to intrude into the privacy of an unwilling individual who wanted to avoid confrontation with this kind of material, or where there was no evidence of "pandering" that no obscenity conviction or suppression could follow consistent with the First Amendment. Thereafter, the Court reversed some thirty-three cases, representing a wide cross-section from both federal and state courts, involving both criminal and civil condemnations, and the Court, in reversing these cases, cited only as its authority *Redrup v. New York, supra.*

In any independent review, the past findings of this Court on the sole issue of obscenity have obvious bearing.

In this respect it is important to note that findings of obscenity have been reversed by this Court as to press materials devoted entirely to explicit depictions or descriptions of sexual activities, including detailed and vernacular descriptions reaching the ultimate in explicitness as to heterosexual intercourse, masturbation, beastiality, oral-genital intercourse, sado-masochism, and homosexual activity. *See, e.g., Memoirs v. Massachusetts,* 383 U.S. 413 (1966) ("Fanny Hill"); *Aday v. United States,* 388 U.S. 447 (1967) ("Sex Life of a Cop" described at 357 F.2d 855); *Corinth Publications v. Westberry,* 388 U.S. 448 (1967); ("Sin Whisper" described at 146 S.E.2d 764); *Mazes v. Ohio,* 388 U.S. 453 (1967) ("Orgy Club"); *Hoyt v. Minnesota,* 399 U.S. 524 (1970) ("The Way of a Man with a Maid," "Lady Susan's Cruise Lover," and three other books); *Grove Press v. Gerstein,* 378 U.S. 577 (1964) ("Tropic of Cancer").

In the area of motion picture films, this Court has reversed findings of obscenity as to films which depict totally nude women; films which depict nude and partially nude men and women engaged in sexual gyrations, simulated intercourse, and simulated oral-genital contact, all emphasizing pubic and rectal areas; and films depicting lesbian sexual activity and hetero-sexual activity between men and women. Moreover, this Court has affirmed a reversal by the Ninth Circuit Court of Appeals of a finding of obscenity as to a "stag film depicting a nude woman masturbating, with emphasis on the female genitalia and sexual gyrations." *Pinkus v. Pitchess,* 429 F.2d 416 (CA 9 1970), *affirmed sub nom. Pinkus v. California,* 400 U.S. 922 (1970).

Thus, the only conclusion which could have been rationally extrapolated from these decisions without opinion is that any publication containing exclusively pictorial material which depicts, graphically and exclusively, nudes in sexual poses and movement, even without presence of social importance, is constitutionally protected. Should the pictures show graphic depiction of sexual acts accompanied by substantial text material, then requisite social value is present and thus the material would not be obscene, which is true in the instant case.

The Court's attention is directed to an examination of the materials which form the basis for this prosecution, the comparable materials admitted in evidence below and the expert testimony given in evidence below. The press materials at bar *sub judice,* when considered as a whole, and as judged against the evidence and press materials of similar or more explicit sexual content heretofore determined by this Court not to be obscene, should thus be held to be protected speech, and the judgment of the Court below should be reversed.

In summary, the Court must make an independent review of the obscenity *vel non* of the publications charged herein as obscene. On the basis of such a complete and independent *de novo* review, and on the basis of the evidence elicited below as to the substantive issue of obscenity, this Court can only conclude that the publications charged herein, especially when judged against the standards prevailing at the time of their distribution, are not obscene. The convictions must therefore be reversed.

CONCLUSION

For the foregoing reasons, a Writ of Certiorari should issue to review the judgment and opinion of the United States Court of Appeals for the Fifth Circuit.

Respectfully submitted,

ROBERT EUGENE SMITH, Esquire
GILBERT H. DEITCH, Esquire
1409 Peachtree Street, N.E.
Atlanta, Georgia 30309
(404) 892-8890

Attorneys for Petitioners.

APPENDIX "A"

UNITED STATES of America,
Plaintiff-Appellee,
v.
Michael G. THEVIS, The Book Bin,
Inc., and Pendulum Books, Inc.,
Defendants-Appellants.

No. 75–1168

United States Court of Appeals,
Fifth Circuit

Feb. 6, 1976.

Defendants were convicted in the United States District Court for the Northern District of Georgia, at Atlanta, Richard C. Freeman, J., of mailing obscene matter, and they appealed. The Court of Appeals, Bell, Circuit Judge, held that the sentence imposed on an individual defendant was not cruel or unusual; that there was sufficient evidence adduced in the trial court to show scienter; and that, while all of the materials in question were obscene under Miller standards, one magazine was protected under the Memoirs standards by inclusion, in significant proportions, of a serious discussion of female homosexuality.

Affirmed in part and reversed in part.

1. **Criminal Law 1213**

Because Miller standards of obscenity, standards well known at time of defendant's actions, were applied in prosecution for mailing obscene matter, there was no force to argument that sentences of three years' imprisonment on three counts to be served concurrently but consecutively to

another five-year term imposed in another prosecution were cruel and unusual because actions in question were undertaken during period of uncertainty in law of obscenity and bona fide attempts were made to anticipate Supreme Court's position. 18 U.S.C.A. §1461; U.S.C.A.Const. Amend. 8.

2. Criminal Law 1213

In construing cruel and unusual punishment clause of Eighth Amendment, Court of Appeals must confine its inquiry to whether conditions of confinement "shocked the conscience," are greatly disproportionate to offense, or offend evolving notions of decency. U.S.C.A. Const. Amend. 8.

3. Criminal Law 1213

Three-year sentence imposed on conviction of mailing obscene matter, such sentence to be served consecutive to five-year sentence imposed in another prosecution, was not cruel or unusual as being excessive in view of changing attitudes of society towards sex. 18 U.S.C.A. §1461; U.S.C.A.Const. Amend. 8.

4. Post Office 50

Evidence in prosecution for mailing of obscene matter was sufficient to entitle jury to infer that defendant, as president, sole shareholder, and corporate official directly concerned with day-to-day activities of corporations involved, was aware of mail solicitation efforts and of contents of brochures, magazines and books. 18 U.S.C.A. §1461.

5. Courts 100(1)

In prosecution for mailing obscene matter which arose out of events occuring before United States Supreme Court decision in Miller v. California, defendants would be given benefits of both Memoirs and Miller standards; materials would not be judged by Redrup standard. 18 U.S.C.A. §1461.

6. Post Office 31(5)

Although other materials in question in prosecution for mailing obscene matter were obscene under Miller standards, one magazine was protected under Memoirs "redeeming social value" standard by inclusion therein, in significant proportions, of a serious discussion of female homosexuality. 18 U.S.C.A. §1461

7. Post Office 31(1)

Where, in prosecution for mailing obscene matter, Court of Appeals found some advertised materials obscene, it was not necessary for court to determine obscenity vel non of advertising circulars themselves, standing alone. 18 U.S.C.A. §1461.

8. Criminal Law 1186.1

Where, in prosecution for mailing obscene matter, Court of Appeals found one of two magazines referred to in single count not to be obscene, Court was required to reverse conviction on such count even though other magazine referred to in such count was obscene. 18 U.S.C.A. §1461.

Appeal from the United States District Court for the Northern District of Georgia.

Before BELL, THORNBERRY and MORGAN, CircuitJudges.

BELL, Circuit Judge.

Appellant Thevis, The Book Bin, Inc., and Pendulum Books, Inc., were convicted on numerous counts of violating 18 U.S.C.A. §1461 which prohibits the mailing of obscene

matter.[1] The subject matter of each count of the indictment involved particular magazines, books, or advertising circulars. Each of the advertising circulars promoted the sale of at least one of the books or magazines charged in other counts of the indictment. The district court instructed the jury to apply the three-pronged test of *Memoirs.*[2]

Appellant Thevis was found guilty on all counts. Appellant Pendulum Books, Inc. was convicted on counts two, three and four, while The Book Bin, Inc. was convicted on counts eight, eleven and fourteen. Appellant Thevis was sentenced to a term of three years imprisonment on each count, the sentences to run concurrently with each other, but consecutively with a five year sentence previously imposed in a federal obscenity prosecution in the Eastern District of Louisiana.[3] Thevis was also fined $5,000 on each count for an aggregate fine of $45,000. The corporate appellants were each fined $5,000 on each count for an aggregate fine of $15,000. We reverse with respect to one count and affirm as to the remaining counts.

---

[1] Originally charged in a seventeen count indictment with violating 18 U.S.C.A. §§1461, 1462 and 1465, were the appellants, Joan C. Thevis, wife of appellant Thevis, Peachtree News Co., Inc. and Peachtree National Distributors, Inc. Subsequently, the government dismissed counts one and fifteen, leaving only the appellants and Joan C. Thevis as defendants. At trial, the district court granted the defendants' motion to dismiss as to four of the counts. The jury returned a verdict of not guilty on all counts as to defendant Joan C. Thevis.

[2] *A Book Named "John Cleland's Memoirs of a Woman of Pleasure" v. Massachusetts,* 1966, 383 U.S. 413, 86 S. Ct. 975, 16 L.Ed.2d1.

[3] *See United States v. Thevis,* 5 Cir., 1974, 490 F.2d 76, affirming the conviction of appellant Thevis.

Appellants present three arguments in urging reversal. These are (1) that the three year sentence of appellant Thevis, when imposed consecutively with the sentence imposed in the Eastern District of Louisiana, constitutes cruel and unusual punishment in violation of the Eighth Amendment; (2) that as to appellant Thevis, the evidence in the record is insufficient to establish the element of scienter, and (3) that the publications charged against the appellants are not obscene and are thus a protected expression under the First Amendment. We address these arguments seriatim.

I. Cruel and Unusual Punishment

[1] The crux of appellant Thevis's argument is that his actions were undertaken during a period of uncertainty in the law of obscenity. As a result, he urges that the total length of his incarceration amounts to a cruel and unusual punishment, imposed despite a bona fide attempt to anticipate the position of the Supreme Court. Because we apply the *Memoirs* standard *infra,* and thus judge the material in question by a standard well known at the time of appellants' actions, this argument has no force.

[2,3] Appellant Thevis also argues that because of the nature of the crime, and the changing attitudes of society toward sex, his punishment is excessive. In construing the cruel and unusual punishment clause of the Eighth Amendment, however, this court must confine its inquiry to whether conditions of confinement "shock the conscience," are greatly disproportionate to the offense, or offend evolving notions of decency. *Trop v. Dulles,* 1958, 356 U.S. 86, 78 S.Ct. 590, 2 L.Ed.2d 630; *Weems v. United States,* 1910, 217 U.S. 349, 30 S. Ct. 544, 54 L.Ed. 793. We view appellant's sentence in light of the discretion inherent in the district court, and decline to hold that a three year sentence, to be served consecutive to a five year sentence imposed in another prosecution, is cruel and unusual. On

sentences in obscenity cases where the cruel and unusual argument has been made, see *Harris v. United States*, 5 Cir. 1957, 239 F.2d 612; *Heath v. United States*, 8 Cir., 1967, 375 F.2d 521. *See generally United States v. Sanchez*, 5 Cir., 1975, 508 F.2d 388; *United States v. Simpson*, 5 Cir., 1973, 481 F.2d 582; *United States v. MacClain*, 10 Cir., 1974, 501 F.2d 1006.

II. Scienter

[4] The second argument of appellant Thevis is that there was insufficient evidence proving scienter. As the Supreme Court stated in *Hamling v. United States*, 1974, 418 U.S. 87, 123, 94 S.Ct. 2887, 2910, 41 L.Ed.2d 590, 624.

> It is constitutionally sufficient that the prosecution show that a defendant had knowledge of the contents of the materials he distributes, and that he knew the character and nature of the materials. To require proof of a defendant's knowledge of the legal status of the materials would permit the defendant to avoid prosecution by simply claiming that he had not brushed up on the law.

Thevis contends that the government did not prove his knowledge of the contents of the publications at issue. The verdict must be sustained however, if there is substantial evidence, taking the view most favorable to the government, to support it. *Glasser v. United States*, 1942, 315 U.S. 60, 62 S. Ct. 457, 86 L. Ed. 680; *Hamling v. United States*, *supra*, 418 U.S. at 124, 94 S.Ct. at 2911, 41 L.Ed.2d at 624.

We find, as in *Hamling*, that based on the evidence before it, the jury was entitled to infer that appellant Thevis, as president, sole shareholder, and a corporate official directly concerned with the day to day activities of

the corporations, was aware of the mail solicitation efforts and of the contents of brochures, magazines and books.

III. Obscenity vel non

[5] Appellants were convicted on November 11, 1971, a date prior to the Supreme Court's decisions in *Miller v. California*, 1973, 413 U.S. 15, 93 S. Ct. 2607, 37 L.Ed.2d 419 and related cases.[4] Appellants urge that the materials in question must be judged by the *Redrup*[5] standard, which they assert the Supreme Court applied at the time of their offense.

This argument is foreclosed by our opinion in *United States v. Thevis*, 5 Cir., 1973, 484 F.2d 1149, a previous case involving the appellant herein. There we held that pre-*Miller* convictions were to be reviewed by giving defendants the benefit of both the *Memoirs* and *Miller* standards.[6] The two tests differ most notably in that to

---

[4] *Paris Adult Theatre I v. Slaton*, 1973, 413 U.S. 49, 93 S.Ct. 2628, 37 L.Ed.2d 446; *United States v. Orito*, 1973, 413 U.S. 139, 93 S. Ct. 2674, 37 L.Ed.2d 513; *Kaplan v. California*, 1973, 413 U.S. 115, 93 S.Ct. 2680, 37 L.Ed.2d 492; *United States v. 12 200-Ft. Reels of Super 8 mm Film*, 1973, 413 U.S. 123, 93 S.Ct. 2665, 37 L.Ed.2d 500.

[5] *Redrup v. New York*, 1967, 386 U.S. 767, 87 S. Ct. 1414, 18 L.Ed.2d 515.

[6] The *Memoirs* standard is as follows:

(1) The dominant theme of the material, taken as a whole must appeal to a prurient interest in sex;
(2) the materials must be patently offensive because they affront contemporary community standards relating to description or representation of sexual matters;
(3) the material must be utterly without socially redeeming value.

find materials obscene under *Memoirs* they must be "utterly without redeeming social value," while *Miller* requires that the material taken as a whole must lack serious literary, artistic, political or scientific value.[7]

[6] In making our independent constitutional judgment under *Jacobellis v. Ohio*, 1964, 378 U.S. 184, 190, 84 S.Ct. 1676, 12 L.Ed.2d 793, as to whether the materials in question are constitutionally protected, we have inspected the magazines in question and have applied both the *Memoirs* and *Miller* standards. We have concluded that all of the materials are obscene under *Miller*, but that one magazine, "Lezo," is protected by the *Memoirs* requirement that to be obscene a work must be utterly without redeeming social value. This magazine is distinguished from the other materials, which we find obscene, in that it contains a serious discussion of female homosexuality. The inclusion of this literary matter in significant proportions precludes a finding that the magazine is utterly without redeeming social value. *Cf. United States v. Thevis, supra*, 484 F.2d at 1157.

(Footnote 6 continued)

The *Miller* standards is as follows:

(1) The average person, applying contemporary community standards would find that the work taken as a whole appeals to the prurient interest;
(2) the materials are patently offensive depictions or descriptions of sexual conduct specifically defined by the applicable statute;
(3) taken as a whole the materials must lack serious literary, artistic, political or scientific value.

[7] As to the second difference between the two standards, no claims is made here as was made in *United States v. Thevis, supra*, 484 F.2d 1149, that 18 U.S.C.A. §1461 does not satisfy the *Miller* requirement that the applicable statute must specifically define the sexual conduct whose depictions or descriptions are prohibited.

[7] The advertising circulars are also prohibited by 18 U.S.C.A. §1461[8] because they give information concerning the means by which obscene materials may be obtained. Because we find obscene some of the advertised materials, it is not necessary to determine the obscenity *vel non* of the circulars standing alone. *Cf. Ginzburg v. United States*, 1966, 383 U.S. 463, 465, n.4, 86 S. Ct. 942, 16 L.Ed.2d 31.

[8] In summary, we thus reverse the convictions as to count eleven[9] of the indictment, which contains the magazines "Lezo" and "The Wild Cats." Though we find no redeeming social value in the latter, the conviction cannot stand because of the inclusion in the count of the one nonobscene item. The judgment of conviction as to the remaining counts is affirmed.

Affirmed in part; reversed in part.

---

[8] 18 U.S.C.A. §1461 provides in part:

> Every written or printed card, letter, circular, book, Pamphlet, advertisement, or notice of any kind giving information, directly or indirectly, where, or how, or from whom [obscene matters] . . . may be obtained . . . ; It is declared to be nonmailable matter . . . .

[9] Thevis and The Book Bin, Inc., were convicted on this count. Appellant Pendulum Books, Inc. was not charged in the count.

APPENDIX "B"

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 75-1168

UNITED STATES OF AMERICA,
Plaintiff-Appellee,
versus
MICHAEL G. THEVIS, THE BOOK BIN, INC.
and PENDULUM BOOKS, INC.,
Defendants-Appellants

Appeals from the United States District Court
for the Northern District of Georgia

ON PETITION FOR REHEARING
(MARCH 3, 1976)

Before BELL*, THORNBERRY and MORGAN, Circuit Judges.

PER CURIAM:

IT IS ORDERED that the petition for rehearing filed in the above entitled and numbered cause be and the same is hereby DENIED.

---

*This order was concurred in by Judge Bell Prior to his resignation from the Court on March 1, 1976.